IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION
SECOND APPEAL NO.902 OF 2006

1. Smt. Tarabai Balwant Jadhav
2. Kumari Sharada Balwant Jadhav
3. Kumari Balik Balwant Jadhav
4. Kumari Chitra Balwant Jadhav
5. Kumar Appa Balwant Jadhav
6. Kumar Sachin Balwant Jadhav.. Appellants
(Orig.Plaintiffs)

Versus

1. Smt. Anusaya Balwant Wagh
2. Smt. Gangubai Vishwanath Aher
3. Vishwanath Bala Aher
4. Shri Balwant Babaji Aher.. Respondents
(Orig.Defendants)

Mr.S.M. Gorwadkar for the Appellants
Ms.Sharvari Shailendra i/b.P.S. Dani for the Respondent Nos.2 and 3

CORAM : S.R. SATHE,J
DATED : 17/08/2007

ORAL JUDGEMENT :-

1. Heard finally at admission stage.

2. The appellants-original plaintiffs in Regular Civil Suit No.35 of 1984 have preferred this appeal against the judgement and order passed by the Court of 4th Additional District Judge, Nashik whereby the order passed by the Civil Judge Junior Division Chandwad dismissing the Plaintiffs' suit for partition and separate possession of the suit land was confirmed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'Defendants' .

3. The brief facts giving rise to this appeal are as under:-

The suit land bearing Survey No.349/A-2 situated at village Vadali Bhoie, Taluka Chandwad was initially owned by Babaji Laxman Jadhav. Babaji died leaving behind two sons namely Balwant and Hari. The defendant No.1 Anusaya Balwant Wagh is the first divorced wife of Balwant, original defendant No.4. Plaintiff No.1 Tarabai is the second wife of Balwant while Plaintiff Nos. 2 to 5 are the sons and daughters of Tarabai and Balwant. After the death of Babaji, partition took place between Balwant and Hari on 18/03/1939 and the suit property came to the share of Balwant and thus, he became absolute owner of the suit property. The divorce between Tarabai and Balwant had taken place on 08/07/1950. Thereafter, Anusayabai had filed suit bearing No.52 of 1960 against Balwant claiming maintenance from him. The said suit was decreed in favour of Anusayabai. For the execution of the said decree, Anusayabai filed Regular Darkhast No.99 of 1973. In Darkhast proceedings suit property was attached and sold under Court auction. Anusayabai, the decree holder, with the permission of the Court purchased the said suit land in Court auction on

28/02/1977 for meager amount of Rs.1255/-. The said sale was confirmed by the Court and Anusayabai received actual possession of the land on 11/06/1980.

4. The defendant No.4 Balwant then filed suit bearing No.210 of 1977 against Anusayabai for setting aside the sale on various grounds. However, the said suit was dismissed on 30/06/1983. Balwant filed Civil Appeal No.413 of 1983 against the said decision but the said appeal also came to be dismissed. According to Plaintiff, Balwant did not make any efforts to protect the rights and interest of the Plaintiff in the suit property. They were also not made parties in regular civil suit No.210 of 1977. As Plaintiff No.5 Appa was borne on 20/03/1983, according to Plaintiff, they were entitled to get partition and separate possession in the suit land. Hence, Plaintiffs filed the present suit and claimed partition and separate possession being heirs of Balwant.

5. The defendants filed their Written Statement Exh-70 and opposed the suit claim. The defendant Nos.1 to 3 admitted in their Written Statement that Anusayabai was the first wife of Balwant and Tarabai is the second wife and Plaintiff Nos.2 to 5 are the sons

of Tarabai from Balwant. They also admitted the litigation between the parties. However, they contended that Plaintiffs were in fact aware of the regular darkhast No.99 of 1973 since the date of its filing. Besides this, they were having knowledge of Regular Civil Suit No.210 of 1977 filed by Balwant. The defendants, therefore, contended that the present suit is barred by limitation. According to them, Balwant was only absolute and exclusive owner of the suit property and the Plaintiff had in fact no right, title and interest in the suit property when the suit property was purchased by Anusayabai in Court auction. They, therefore, prayed for the dismissal of the suit.

6. The defendant No.4 Balwant did not file any Written Statement.

7. On considering the pleadings of the parties the learned Trial Judge framed issues at Exh-34. In order to prove Plaintiffs claim, Tarabai examined herself. As against this, on behalf of defendant Nos. 1 to 3, defendant No.3 was examined. Both the parties produced certain documents. After considering the entire evidence, the learned Trial Judge came to the conclusion that the suit is barred by law of limitation

and the decree passed in Regular Civil Suit No.210 of 1977 operates as res-judicata creating bar to the present suit. The trial court also held that Plaintiffs have failed to prove that fraud was played upon the executing Court. Hence, on all these grounds, the trial court dismissed the Plaintiff's suit.

8. Being aggrieved by the said judgement and order, Plaintiff's filed Civil Appeal No.40 of 1993. In that appeal, it was argued on behalf of the Plaintiffs that when the property was sold in Court auction the Plaintiffs had right, title and interest in the said property. The liability of Balwant to pay maintenance to Anusayabai was personal liability and for that he was not entitled to sell the entire joint family property. At the most only Balwant's share could have been put to auction. It was, therefore, argued that auction purchaser had purchased the property subject to right, title and interest of the other members and as such, Plaintiffs are entitled for partition and separate possession. The learned Additional District Judge, however, held that when the property was put to auction, there was no other male member in the family. Even, Plaintiff No.1 had only right of maintenance. So, under such circumstances, there was no bar for sale of

the entire property and Plaintiff had no right, title and interest when the sale was confirmed. Plaintiff No.5 was born after the said sale and as such, Anusayabai had become the owner of the said property and no partition or share can be claimed in the suit property by the Plaintiffs. He, therefore, dismissed the appeal and confirmed the order of dismissal of the suit passed by the Trial Court.

9. The above mentioned order is challenged in the present appeal. In this appeal before me, Mr.S.M. Gorwadkar for the Appellants-original Plaintiffs has urged only one point. He submitted that by virtue of the Amended provision of section-6(1) of the Hindu Succession Act, it must be held that even on the date of auction, daughters of Balwant had a right in the suit property and as such the entire suit property could not have been sold. The said sale is binding at the most to the extent of Balwant's share. He, therefore, submitted that the appeal be allowed and Plaintiff's suit be decreed accordingly.

10. As against this, Ms.Sharvari Shailendra i/b. P.S. Dani for the Respondents-original defendants submitted that present case squarely falls under the

Proviso to section and the said section is not retrospective and on the date of purchase of the suit property in the Court auction Sale Anusayabai became full owner of the suit property and Plaintiffs are not entitled to get any share. She, therefore, submitted that the appeal be dismissed.

11. It is not in dispute that Anusayabai, the original defendant No.1 is the first wife of the defendant No.4 Balwant and she was divorced by Balwant on 08/07/1950. Admittedly, Plaintiff No.1 is the second wife of Balwant and Plaintiff Nos. 2 to 5 are their children and Plaintiff No.5 Appa was born on 20/03/1983. It is also not in dispute that Anusayabai had filed suit and ultimately in execution of the said decree, property in question was purchased by Anusayabai on 28/02/1977. So, admittedly, on that day, besides Balawant, there was no other co-parcener because there were only female members i.e. Plaintiff Nos. 1 to 4. So, the question arises if the property is sold by the sole co-parcener whether the said alienation can be challenged by the other female members in the joint family. In **Shantaya Kotraya Bannednula V/s. Mallappa Basappa Shettar (AIR 1938 Bombay Page 500) and Jupudi Venkata Vijay Bhaskar V/s**

Jupudi Keshava Rao and Others (1994)(2) Current Civil Cases 721). It has been laid down that any alienation made before a son is born to or adopted by sole surviving co-parcener such alienation can not be challenged or objected by the new co-parcener. It is also held that the alienation can be challenged only by male coparcener if he was living on the date of alienation and was not separated from the coparcenery on the date of alienation.

12. Mr.S.M. Gorwadkar, learned Advocate for the Appellants-original Plaintiffs strenuously argued before me that the amended provision of section 6(1) of Hindu Succession Act is retrospective and as such, it be held that the daughters of Balwant had right, title and interest in the suit property when the same was sold in auction.

13. In order to find out whether there is any substance in this argument it would be worthwhile to see what Section-6(1) of the Hindu Succession (Amendment) Act, 2005 says. It runs as follows :-

> ***"{6. Devolution of interest in coparcenary property :-***
> ***(1) On and from the commencement of the***

> ***Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall -***
>
> ***(a) by birth become a coparcener in her own right in the same manner as the son;***
>
> ***(b) have the same rights in the coparcenary property as she would have had if she had been a son;***
>
> ***(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,***
>
> ***and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener ;***
>
> ***Provided that nothing contained in this sub-section shall affect or invalidated any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."***

14. However, the bare reading of this section and in particular proviso, it is very clear that there is nothing in this provision to show that the rights vested in the party prior to coming into operation of this provision stand divested. So, I have no hesitation to hold that the above mentioned provision is of no help to the present Plaintiff.

15. Both the Courts below have rightly appreciated

the entire evidence on record and I have correctly held that on the date of sale of the suit property in Court auction the present Plaintiff had in fact no right, title and interest by virtue of which they can challenge the said court auction. Hence, the order passed by the learned Additional District Judge is legal and correct. In this view of the matter, there is no substance in this appeal.

Appeal be dismissed in limine.

(S.R. SATHE,J.)